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No. _____

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1996

CITY OF SAN JUAN, TEXAS, Petitioner

V.

NORTH ALAMO WATER SUPPLY CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE PROVISIONS OF 7 U.S.C. § 1926(b) ARE ENFORCEABLE AGAINST THE CITY OF SAN JUAN OR THE STATE OF TEXAS UNDER THE "CONDITIONAL SPENDING" TEST ADOPTED BY THIS COURT IN SOUTH DAKOTA v. DOLE, 483 U.S. 203 (1987)?

2. WHETHER THE PROVISIONS OF 7 U.S.C. § 1926(b), AS APPLIED BY THE MAGISTRATE AND AFFIRMED BY THE COURT OF APPEALS, MAY BE UPHELD AS A PROPER EXERCISE OF POWER BY CONGRESS UNDER THE SPENDING CLAUSE TO THE U.S. CONSTITUTION?

3. WHETHER CONGRESS CLEARLY AND MANIFESTLY DECLARED AN INTENT TO IMMUNIZE FEDERALLY-INDEBTED CORPORATIONS UNDER 7 U.S.C. §1926(a) FROM THE REACH OF TEXAS WATER CODE §§ 13.254 AND 13.255?

NAMES OF ALL PARTIES TO THE PROCEEDINGS

City of San Juan, Texas

North Alamo Water Supply Corporation

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OPINIONS BELOW

The opinion of the U.S. District Court delivered in this case is not published. The opinion of the U.S. Court of Appeals for the Fifth Circuit has been ordered for publication. The text of both opinions is found in the Appendix to this petition.

STATEMENT OF JURISDICTION

This is a petition for writ of certiorari from a judgment entered by the Fifth Circuit Court of Appeals on April 15, 1996. Petitioner timely filed a motion for rehearing, and this motion was denied on June 3, 1996. No requests for extension of time in which to file this petition for writ of certiorari have been made by the Petitioner. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1) (1995).

28 U.S.C. § 2403(a) may apply. Neither the United States Court of Appeals for the Fifth Circuit Court, nor the United States District Court for the Southern District of Texas, McAllen Division, below certified to the Attorney General of the United States the fact that the constitutionality of an act of Congress was drawn into question. This document shall be served on the Solicitor General of the United States, in accordance with Rule 29.4(b).

U.S. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. U.S. Const., art. I, § 8, cl.1
2. U.S. Const., art. I, §8, cl.18
3. 7 U.S.C. § 1926(b)

(Verbatim text of the constitutional provisions and statutes is contained in Appendix F)

STATEMENT OF THE CASE

Defendant, San Juan, a Texas municipality, has been permanently enjoined by final judgment of the district court prohibiting Defendant, in part, from applying to the Texas Natural Resources Conservation Commission (the "Commission") to decertify the Plaintiff, North Alamo Water Supply Corporation ("North Alamo"), from a portion of the water service area granted under its certificate of convenience and necessity (the "CCN"). The issues relate to whether the permanent injunction is sustainable on the basis that 7 U.S.C. § 1926(b) preempts state law or is a "conditional spending" enactment pursuant to the Court's four-part test. South Dakota v. Dole, 483 U.S. 203 (1987).

1. Proceedings At The District Court

San Juan filed applications with the Commission under §§ 13.254 and 13.255 of the Texas Water Code seeking to decertify North Alamo from serving the area. In response, North Alamo filed a complaint in the District Court for the Southern District of Texas (McAllen Division) pursuant to 7 U.S.C. § 1926(b) seeking, in part, to enjoin San Juan from continuing to provide water services to the area and from pursuing its applications to the Commission.

In a separate administrative proceeding, San Juan has been enjoined pursuant to § 13.252 of the Texas Water Code from serving five subdivisions within North Alamo's CCN Area. See Tex. Nat. Res. Conserv. Comm'n, Order Granting the Petition of North Alamo Water Supply Corp. for a Cease and Desist Action against the City of San Juan. Docket No. 95-0599-UCR, slip op. (May 30, 1995); appeal docketed, No. 03-96-00219-CV, City of San Juan v. Tex. Nat. Res. Conserv. Comm'n and North Alamo Water Supply Corp. (Tex. App.--

Austin). [hereinafter "State Cease and Desist Order"].

On February 22, 1994, the case proceeded to trial before a magistrate by agreement of the parties pursuant to 28 U.S.C. § 636(c). The magistrate denied San Juan's Rule 12(b)(6) Motion To Dismiss For Failure to State A Cause of Action, see Motion To Dismiss For Failure to State a Claim Upon Which Relief Can Be Granted, February 22, 1994, North Alamo Water Supply Corp. v. City of San Juan, Tex., No. M-93-265 (S.D.--Texas) and Rule 19 Motions To Dismiss for Failure To Join The Farmers Home Administration ("FmHA") and the Texas Natural Resources Conservation Commission as Necessary and Indispensable Parties. See Defendant's Supp. Memo. of Authorities in Support of its Motion to Join the FmHA as Additional Plaintiff, and Alternative Motion to Dismiss for Failure to Join an Indispensable Party, dated July 22, 1994, North Alamo Water Supply Corp. v. City of San Juan, Tex., No. M-93-265 (S.D.--Texas) [hereinafter Def. Supp. Memo.]. On May 15, 1995 the magistrate entered final judgment. It ordered San Juan to cease providing service to the area; to turn over the water infrastructure in the area it was serving to North Alamo, and to recall its two applications to the Commission. The magistrate denied San Juan's Post-Judgment Rule 59(c) Motion for a New Trial; See Defendant's Motion for a New Trial, December 27, 1994, North Alamo Water Supply Corp. v. City of San Juan, Tex., Civil Action No. M-93-265 and Rule 59(e) Motion To Amend The Judgment on grounds that 7 U.S.C. § 1926(b) (the "Act") did not apply and that Plaintiff had failed in its burden of proof under the Act. See. Defendant's Motion To Alter or Amend the Judgment, December 27, 1994, North Alamo Water Supply Corp. v. City of San Juan, Tex., Civil Action No. M-93-265.

2. Appeal to the Fifth Circuit Court of Appeals

San Juan appealed to the Fifth Circuit Court of Appeals on numerous issues. The Fifth Circuit Court of Appeals upheld the District Court's judgment, but remanded in part for a determination of the value of, and compensation for, any property which the City owned in the transferred infrastructure. The Court declined to consider San Juan's challenge that the provisions of the Act were not enforceable against San Juan or the State of Texas pursuant to the "conditional spending" test adopted by this Court in South Dakota v. Dole, 483 U.S. 203 (1987). It also declined to consider San Juan's challenge to the District Court's opinion that the applications to the Commission by San Juan were preempted by 7 U.S.C. § 1926(b). Finally, the court held that the State Cease and Desist Order rendered moot San Juan's challenge to the federal prohibition against initiating administrative proceedings. San Juan contended that as applied by the magistrate, the provisions of the Act could not be upheld as a proper exercise of power by Congress under the Spending Clause to the U.S. Constitution.

The State Cease and Desist Order covered a separate legal issue. The Commission took jurisdiction only under § 13.252 of the Water Code. See State Cease and Desist Order at 1. The Commission was unable to consider San Juan's application under §§ 13.254 and 13.255 of the Water Code because in obedience to the magistrate's injunction, San Juan asked the Commission to abate that consideration. The §§ 13.254 and 13.255 applications are still pending. See. Tex. Nat. Res. Conserv. Comm'n, In the Matter of the Applications for the City of San Juan, North Alamo Water Supply Corp. and Military Highway Water Supply Corp. (North Alamo Water Supply Corp. v. City of San Juan, Texas) Docket No. 9902-C (May 30, 1995).

The Court of Appeals correctly states that San Juan did not raise the constitutionality of 7 U.S.C. § 1926(b) at trial. But in its Rule 19(b) Motion To Join FmHA As An Indispensable Party, San Juan called the magistrate's attention to the source of 7 U.S.C. §1926(b) as Congressional power under the Spending Clause and the need to join the federal and state governments as indispensable parties to the action. See Def. Supp. Memo.

The Court of Appeals order was entered April 15, 1996. San Juan's subsequent motion for rehearing was denied on June 3, 1996. City of San Juan, Tex. v. North Alamo Water Supply Corp., No. 95-40048, slip op. (5th Cir. April 15, 1996).

ARGUMENT

At issue is the reach of Congress' authority invoking federal power solely pursuant to the Spending Clause, when Congress enacts substantive prohibitions on state legislative functions which have been historically recognized as traditional core state functions. U.S. CONST. art. I, § 8, cl.1.

THE PROVISIONS OF 7 U.S.C. § 1926(b) ARE NOT ENFORCEABLE AGAINST THE CITY OF SAN JUAN OR THE STATE OF TEXAS UNDER THE "CONDITIONAL SPENDING" TEST ADOPTED BY THIS COURT IN SOUTH DAKOTA v. DOLE, 483 U.S. 203 (1987).

The Court has adopted a four-part test for determining the applicability and enforceability against a state of substantive conditions attached to federal spending legislation. South Dakota v. Dole, 483 U.S. 203 (1987); Accord New York v. United States, 112 S.Ct. 2408 (1992); see also Pennhurst State

School & Hosp. v. Halderman, 451 U.S. 1, 17 (1981). San Juan has contended below that two requirements of the Court's test have not been satisfied in 7 U.S.C. § 1926(b) (the "Act") to allow enforcement of the Act against San Juan or to preempt provisions of State law. First, the federal law must "clearly and unambiguously" set forth the conditions which must be agreed to for receipt of federal funds. New York, 112 S.Ct. at 2423; Pennhurst, 451 U.S. at 17. Second, the state must "knowingly and voluntarily" accept the conditions imposed by the federal spending law. New York,112 S.Ct. at 2423; Pennhurst, 451 U.S. at 17. It must have the option to refuse to participate in the program. Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

The Act is not set out in a prototypical "conditional spending" format. Quite the contrary, it purports to displace state law *directly*. Further, North Alamo is neither a political entity nor agent of the state of Texas. See Tarrant County Water Supply Corp. v. Hurst-Eules-Bedford Indep. School Dist., 391 S.W.2d 162, 163 (Tex. App.--Ft. Worth 1965, n.r.e.); TEX. REV. CIV. STAT. ANN. art. 1434a §5 (Vernon 1980). Therefore, the acceptance of the FmHA funds by North Alamo is not, as a matter of law, acceptance of these funds by Texas or San Juan under any legal theory which has been approved by this Court. As noted, Petitioner did not challenge the constitutionality of the federal law at trial in the same posture as it did at the Court of Appeals. But Petitioner has pointed out to the Court that the federal law is not constitutionally obnoxious *ab initio*. One of the arguments made below by Petitioner regarding the Act was that "for its regulatory provisions to apply, the State of Texas had to "voluntarily and knowingly" accept its benefits and restrictions." See Brief for the City of San Juan, Texas, North Alamo Water Supply Corp. vs. City of San Juan, No. 95-40048. This is not a challenge to the constitutionality of the Act. It is a point of

error of law.

THE PROVISIONS OF 7 U.S.C. § 1926(b), AS APPLIED BY THE MAGISTRATE AND AFFIRMED BY THE COURT OF APPEALS, MAY NOT BE UPHELD AS A PROPER EXERCISE OF POWER BY CONGRESS UNDER THE SPENDING CLAUSE TO THE U.S. CONSTITUTION.

The "conditional spending" doctrine is well-settled. See, e.g., Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 (1981), South Dakota v. Dole, 483 U.S. 203 (1987), and New York v. United States, 112 S.Ct. 2408 (1992). Under that doctrine, Congress' power to require a state to comply with a federal law is enforceable under general contract principles. Hence, in review of "conditional spending" cases, there is no need for preemption analysis. See Pennhurst, 451 U.S. at 17. Rather, the function of the judiciary is to determine whether "the state voluntarily and knowingly accepted the terms of the contract". Pennhurst, 451 U.S. at 17. If it did, the conditions attach. If the state fails to adhere to the conditions, it loses the federal funding. Oklahoma v. Civil Service Comm'n, 330 U.S. 127 (1947); Compare United States Dep't of Transp. v. Paralyzed Veterans of America, 477 U.S. 597, 605 (1986). The Fifth Circuit disregards this approach in its analysis below.

Every court that has interpreted 7 U.S.C. § 1926(b) has concluded that the Act invokes only the spending power of Congress. See, e.g., City of Madison, Miss. v. Bear Creek Water Ass'n, Inc. 816 F.2d 1057 (5th Cir. 1987), Glenpool Utility Services Auth. v. Creek County Rural Water Dist. No. 2, 861 F.2d 1211, 1215 (10th Cir. 1988), and San Juan, No.95-40048 slip op. (5th Cir. April 15, 1996).Yet, only one of the courts of appeals has applied this Court's "conditional spending"

standard of review in passing on the Act's applicability. Glenpool Utility Services Auth. v. Creek County Rural Water Dist. No. 2, 861 F.2d 1211, 1215 (10th Cir. 1988).

Petitioner urged the court below to apply the Glenpool "conditional spending" interpretation. The Tenth Circuit Court of Appeals does not rely on federal preemption to arrive at the Act's applicability. Glenpool views 7 U.S.C. § 1926(b) as "conditional spending" legislation. Glenpool, 861 F.2d at 1216. It therefore applies the Act's specific prohibitions to the State and the encroaching City on a contractual basis:

> In so borrowing, Oklahoma -- through its authorized entity, District No. 2 -- bound itself and all of its subdivisions including the City of Glenpool, to the conditions it had accepted.

Glenpool, 861 F.2d 1216. Petitioner contends that Glenpool applies the correct legal standard of review, but disagrees that it correctly applied the Act under the facts presented.

The Fifth Circuit currently follows its precedent-setting case-Bear Creek. In Bear Creek, the Fifth Circuit held that § 1926(b) preempted the state's power of eminent domain:

> When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield.

Bear Creek, 816 F.2d at 1061 (citing Helvering v. Davis, 301 U.S. 619, 645, 57 S.Ct. 904, 910 (1937)).

Helvering does not support the Fifth Circuit's tenet that the Spending Clause authorizes Congress to directly and

substantively legislate in matters extraneous to its enumerated powers without regard to traditional core state functions. In Helvering, Justice Cardozo noted two elements of the Social Security Act which made it "conditional" rather than coercive: 1) the tax credit was approved by the state and could not be a law without it, and 2) the state had the discretion to repeal the unemployment law. Helvering, 301 U.S. at 592-93. Congress may not use *any* means as an exercise of the Necessary and Proper Clause as an adjunct to the Spending Clause to reach an unenumerated matter. See,e.g., Pennhurst, 451 U.S. at 17. See Engdahl, The Spending Power, 44 DUKE L. J. 1, 20 (1944); Yet, this is the construct under which the opinions of the district court and courts of appeals below are grounded.

The Fifth Circuit contends that "[t]he service area of a federally-indebted water association is sacrosanct: "[e]very federal court to have interpreted §1926(b) has concluded that the statute should be liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachment." See San Juan, No. 95-40048 slip op. at 10 (5th Cir. April 15, 1996). The Fifth Circuit has previously indicated, however, that whether federal law requires the people of Texas or San Juan to yield to a federally-imposed sacrosanctity may not depend on preemption analysis, but on the type of review urged by San Juan. See United States v. Lopez, 2 F.3d 1342, 1367 (5th Cir. 1993). In Lopez, the federal government argued to the Court that because the federal government had invested thousands of dollars in the San Antonio Independent School District, "the federal government is entitled to [directly] protect its investment in education." Hence, the court should enforce the Gun-Free Zone Schools Act. Lopez, 2 F.3d at 1342 n.50. The Court rejected the contention:

> "Although Congress may attach conditions to the receipt of federal funds, it must do so unambiguously."

Lopez, 2 F.3d at 1342 n.50. See Van Alstyne, Federalism, Congress, The States And The Tenth Amendment: Adrift In The Cellophane Sea. 5 DUKE L. J., 769, 771-772 (1987).

Where there has been no showing of a knowing acceptance by the City or the State of Texas of any federal funds whose receipt is conditioned on compliance with § 1926(b), there can be no finding that the Act applies as found by the Court below.

CONGRESS DID NOT CLEARLY AND MANIFESTLY DECLARE AN INTENT TO IMMUNIZE FEDERALLY-INDEBTED CORPORATIONS UNDER 7 U.S.C. § 1926(a) FROM THE REACH OF TEXAS WATER CODE §§ 13.254 AND 13.255.

This Court has found instrumentalities of the federal government immune from the reach of state law in two instances. Congress may expressly provide specific immunity to instrumentalities it creates. Pittman v. Home Owner's Loan Corp., 308 U.S. 21, 31 (1939). Likewise, the activities of a corporation through which the national government acts are "governmental functions and entitled to whatever immunity attaches to those functions when performed by the [federal] government itself through its departments." McCulloch v. Maryland, 4 Wheat. 316, 421,422 (1819). The power to create implies the power to protect. Id. This Congressional power to immunize federal instrumentalities from the reach of state law derives from the Necessary and Proper Clause of the U. S. CONST., art. I, §. 8, cl. 18; Pittman, 308 U.S. at 33.

The trial court's judgment immunizes North Alamo from regulation by the State pursuant to §§ 13.254 and 13.255 of

the Texas Water Code. The indebted-utility shall now decide if and when it wishes to provide service within its state-issued CCN, and when others may be allowed to do so. The judgment provides: "San Juan shall not offer to provide water services...within North Alamo's service area...except by North Alamo's written agreement or release." North Alamo v. City of San Juan, No. M-93-265 at 2-3 (S.D.--Tex.), Dec. 14, 1994 (not designated for pub.) Every federal district court in Texas is now obligated to grant summary judgment on the motion of an indebted-utility to any purported "curtailment" of its CCN service area by a municipality.

The plain import of that order is that the provisions of the Texas Water Code which govern the award of CCNs, as well as their regulation, have been preempted. But the most perplexing effect of the order is that North Alamo (as opposed to FmHA or the federal government) holds the discretion to allow a change in the state-issued CCN. The only realistically conceivable grounds for the Court's holding is that by enactment of 7 U.S.C. § 1926(b) Congress intended to protect indebted corporations as its own instrumentalities. However, nothing in the Act authorizes these corporations immunity because they perform federal governmental functions.

Perplexing as well is the fact that the directors of the corporation are private individuals elected by members of the corporation. TEX. REV. CIV. STAT. ANN. art. 1434a § 5 (Vernon 1980). Membership is voluntary and a member need not be a resident of the state or a United States citizen. Id.

The trial court's rationale for immunizing the North Alamo is grounded on Bear Creek's view that Congress desired to protect the federal interest in getting paid the loan. It reasoned that to accomplish this, Congress wanted to protect the so-called "service area" from outside competitors who might

draw away customers. Bear Creek, 816 F. 2d at 1059. If that competition occurred, it might impact on the indebted-corporation's ability to pay the loan. Further, any competition with the indebted utility might siphon funds which might be available to pay the loan. Since under state law North Alamo is required to provide service to all parts of its CCN or lose the CCN, then if it loses any portion of that CCN area, it may lose customers, which will affect the revenue base to pay back the loan.; See North Alamo v. City of San Juan, No. M-93-265 (S.D.--Tex) Dec. 14, 1994 at 7-15 [(citing Bear Creek, 816 F. 2d at 1059); see Glenpool Utility Services Auth. v. Creek County Rural Water Dist. No. 2, 861 F .2d 1211, 1214 (10th Cir. 1988), cert. denied 490 U.S. 1067 (1989)]. Hence, to avoid even the most insignificant risk that any of the above would occur, the trial court opined that even action by the Commission may be preempted:

> Although not raised by the parties, these circumstances suggest the possibility that § 1926(b) preempts the state administrative procedure invoked by San Juan [to obtain certification under §§ 13.254 or 13.255 of the Water Code]...because it frustrate[s] the purpose of the federal statute.

North Alamo, No. M-93-265 at 20, n.12; see also Jennings Water, Inc. v. City of North Vernon, Ind., 682 F. Supp. 421 (S.D. Ind. 1988), aff'd, 895 F. 2d 311 (7th Cir. 1989); North Shelby Water Co. v. Shelbyville Mun. Water & Sewer Comm'n, 803 F. Supp. 15 (E.D. Ky. 1992).

The magistrate had no discretion but to follow a preemption analysis consistent with Bear Creek. San Juan has argued below that this constituted an error of law. The Court of Appeals, however, hedged on this point, stating:

> It would have been more prudent to limit the injunction to the disputed areas, the particular portion of the Utility's service area at the heart of the litigation. As the Commission was not a party to this litigation, we assume the district court intended to limit this injunction only to the parties...[.] Such an injunction, purporting to control the actions of the Commission, a state regulatory body, would create a considerably more difficult federalism question: Namely, does § 1926(b) also preclude a state regulatory agency from modifying the service area of a federally indebted utility. But we leave that issue for another day.

San Juan, No. 95-40048, slip op. at 16 (5th Cir. April 15, 1996).

While there is a factual difference between enjoining San Juan from applying to decertify North Alamo and enjoining the Commission from turning over certification to San Juan, the distinction is fictional since the legal consequences are the same. First, the action by San Juan is an exercise of state power just as much as the Commission's is. Compare Rust v. Johnson, 597 F. 2d. 174, 177 (9th Cir. 1979). Second, under the Texas Water Code, the modification of North Alamo's "service area" is being accomplished because the legislature has enacted a law which requires that. See TEX. WATER CODE ANN. §§ 13.254 and 13.255 (Vernon 1995).

Finally, the judgment below signals to lower courts everywhere to take a deferential view when considering the displacement effect of federal spending laws on state law. While couched in terms of a limited preemption of predatory acts by municipalities, the judgment below makes limitless the means by which Congress may directly preempt state law by relying on the Spending Clause. This Court has never sanctioned the use of **any means whatsoever** as legitimate under the Spending Clause

to displace state law.

REASONS FOR GRANTING THE WRIT

1. 7 U.S.C. § 1926(b): Preemption vs. "Conditional Spending"

Petitioner requests the Court to grant writ to resolve the issues which are raised by the judgments of the courts below. The Court's resolution of these issues will resolve the question of whether the provisions of 7 U.S.C. § 1926(b) apply to the States as "conditions" imposed pursuant to the Spending Clause or as direct law via preemption regulating the states as states.

2. Reconcile or Resolve Disputes in Fifth and Tenth Circuits.

Petitioner has pointed out how the Fifth Circuit Court of Appeals in Bear Creek and San Juan has declined any meaningful role in determining the scope of congressional intent in the Act on the basis of "conditional spending." The panel defers to a supremacy analysis. On the other hand, the Tenth Circuit in Glenpool does apply this Court's "conditional spending" test. Is one of the circuits in error? If so, while the error may lie only in the process of review by the Courts, its effect may be to attribute to Congress certain powers which Congress did not intend to exercise or which the Constitution does not give to Congress, and which this court has never sanctioned.

There are very good reasons why the courts below intuitively defer to a preemption analysis. In 7 U.S.C. §1926(b), we do not find "conditional spending" legislation in the typical sense. The lines are "blurred" indeed. There is no challenge by

the States of a federal cut-back in funds for highways as there was in Dole, 483 U.S. at 2030. There is no Solicitor General representing federal interests. See Pennhurst, 451 U.S. at 24. In fact quite the opposite has occurred in this case. Petitioner's pre-trial motion to dismiss on the basis that the State of Texas and the FmHA were indispensable parties was rejected summarily.

If the federal Act is enacted pursuant to the Spending Clause it is unimagineable that the contracting parties are not even litigants. But how else can there be knowing "acceptance if a state is unaware of the conditions or is unable to ascertain what is expected of it." Pennhurst, 451 U.S. at 17.

3. The "Plain Meaning Rule"

Beyond addressing immediate issues which this case presents, the Court should grant writ to consider whether the Court should extend the use of the "plain meaning rule" adopted by this Court in Gregory v. Ashcroft to "conditional spending" legislation promulgated pursuant to the Spending Clause. Gregory v. Ashcroft, 501 U.S. 452,462, (1991). (adopting the "plain meaning rule").

During its most recent terms, the Court has questioned the propriety of its traditional deferential standard of review when Congress purports to legislate over those matters recognized historically as core state functions. Id. Reliance on the "plain meaning rule" has served as a meaningful procedural counterbalance in gleaning the full import of legislation by Congressional use of the Commerce Clause. See, e.g., New York v. United States, 112 S.Ct. 2408 (1992); Gregory v. Ashcroft, 501 U.S. at 460.

The Court has not been as anxious, however, to

reconsider the same deference it has traditionally given to Congressional use of the Spending Clause to impose federal policy on the states. Steward Machine Co. v. Davis, 301 U.S. 548 (1937). Yet, "conditional spending" legislation may raise similar, if not more substantial, political accountability concerns. The Court has acknowledged that the policy of offering "incentives" to the States in return for adoption of federal policy may become "coercive", and as such, unconstitutional. See South Dakota v. Dole, 483 U.S. 203, 211 (1987); see also New York v. United States, 112 S.Ct. 408 (1992); and Hoke, Constitutional Impediments To National Health Reform: Tenth Amendment And Spending Clause Hurdles, 21 HASTINGS CONST. L. Q. 89, 93 (1994).

The deference given congressional power in "conditional spending" cases is rational and is most fittingly relied on in those instances in which two things occur: 1) the federal monies flow into state coffers or the coffers of its political subdivisions, and, 2) the state legislature enacts the desired federal policy, or the state's authorized agencies incorporate federal policy into law. The "consent" element is clear and unmistakable: the State has voluntarily subjected itself to the terms of the contract. By further reliance on contract law metaphor, it may be said that the States can be held to "specific performance." Therefore, they should not be heard to complain once having availed themselves of the federal benefits. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 348 (1936).

There are conceivable occasions, however, in which deference will lose its rationality: 1) if the legal relationship between the States and the federal funds recipients is non-existent or far-removed; or 2) the federal "conditions" are mandatorily imposed rather than consented to.

While the focus of the "plain meaning rule" is on the

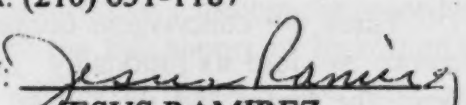
process of statutory interpretation, it serves two substantive purposes. First, its use may have the potential to hold all legislators directly accountable. For instance, neither San Juan nor North Alamo can purport to represent the critical federal and state interests that are at stake in this litigation. But because the lines of accountability have been blurred, so have the identity and interests of the real parties.

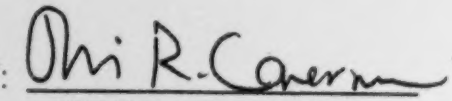
Second, left with the clear guidance which the "plain meaning rule" provides for statutory interpretation, the Courts may not instinctively decline *any* statutory review to determine Congressional intent consistent with the legitimate reach of Congressional power under the Spending Clause. By relying on the rule, nonetheless, all Courts must still enforce the unequivocal, expressed, congressional declaration of intent to displace traditional core state functions.

CONCLUSION

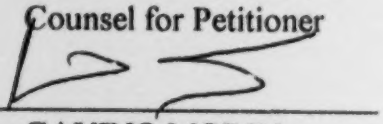
For the reasons advanced and for the further reason that this Court has not decided the scope of the 7 U.S.C. § 1926(b), this petition for certiorari should be granted.

Respectfully submitted,
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